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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 773

QUEEN INSURANCE COMPANY OF AMERICA,
PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 40–44) is reported at 40 B. T. A. 484. The opinion of the Circuit Court of Appeals (R. 220–221) is reported at 115 F. (2d) 341.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered November 20, 1940 (R. 221–222). Petition for a writ of certiorari was filed February 18, 1941. The jurisdiction of this Court is invoked

under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the taxpayer, a domestic insurance company taxable under Section 204 of the Revenue Act of 1934, is entitled to a foreign tax credit in the amount of the Canadian income tax actually owed and paid by it during the taxable year, or is entitled to a larger credit in the amount of the Canadian income tax which would have been payable by it had it not been entitled under Canadian law to deduct from the income tax the amount of a premiums tax paid for the same period.

STATUTES INVOLVED

The pertinent federal and Canadian statutes are set forth in the Appendix, *infra,* pp. 8–12.

STATEMENT

The facts were stipulated before the Board of Tax Appeals (R. 62–216) and were found by the Board as stipulated (R. 40). They may be summarized as follows:

Petitioner is a stock insurance company incorporated under the laws of New York with its principal office in New York City (R. 62). During the year 1934 taxpayer transacted business in Canada and as a result incurred liability for and paid certain taxes to Canada (R. 64). Among the taxes paid was an excise tax imposed by Part III (Section 14)

of the Canadian Special War Revenue Act of 1915, as amended (R. 112; Appendix, *infra,* p. 11), and an income tax imposed by the Canadian Income War Tax Act of 1917, as amended (R. 64–67, 134–210). The excise tax imposed by the Special War Revenue Act was a one percent tax upon the premiums received in Canada (R. 112). The amount of excise tax paid by petitioner was $5,404.94 (R. 65).

Section 7 of the Canadian Income War Tax Act of 1917 provides that "A taxpayer shall be entitled to deduct from the tax that would otherwise be payable by him under this Act," the amount of excise tax paid under the Special War Revenue Act. Petitioner's net income in Canada during 1934 was $51,289.23; the applicable income tax rate was 13½%. Consequently, the taxpayer's income tax liablity would have been $6,924.05 were it not for the deduction allowed by Section 7. By reason of Section 7, however, petitioner was allowed a deduction of $5,404.94, representing the excise tax which it had paid. Accordingly, petitioner owed and paid a Canadian income tax for the year 1934 in the amount of $1,519.11 (R. 65, 70).

The Commissioner determined that petitioner was entitled to a foreign tax credit for the year 1934 in the amount of only $1,519.11, the amount of the Canadian income tax actually paid. The amount of the excise tax paid was allowed as a

deduction from gross income but not as a credit (R. 66). A deficiency was assessed accordingly (R. 26–33). The Board of Tax Appeals held that respondent was entitled to a credit of $6,924.05, rather than to a credit of only $1,519.11 (R. 43–44), but the Circuit Court of Appeals reversed, upholding the Commissioner's determination (R. 220–222).

ARGUMENT

The Revenue Act of 1934 allows a credit against the income tax of the amount of any "income, war-profits and excess-profits taxes" paid or accrued during the taxable year to any foreign country or to any possession of the United States. Sections 31, 131 (a) (1), 205, *infra,* pp. 8–9. Excise and other taxes paid or accrued to foreign countries may be taken as a deduction from the taxpayer's gross income but may not be the subject of a credit. Sections 23 (c), 204 (c) (3), *infra,* pp. 8, 9–10. See *Eitingon-Schild Co., Inc.* v. *Commissioner,* 21 B. T. A. 1163, 1164, 1174–1175.

It is entirely clear that the premiums tax which taxpayer paid to Canada pursuant to the Canadian Special War Revenue Act of 1915 was a business privilege or excise tax and not an income tax within the meaning of the Revenue Act of 1934. See *Pacific Insurance Company* v. *Soule,* 7 Wall. 433, 446, holding a very similar tax imposed by Section 105 of the Act of June 30, 1864, c. 173, 13 Stat. 223, 276, as amended, to be an "excise." See also

Equitable Life Society v. *Pennsylvania*, 238 U. S. 143, 146–147; *Provident Savings Ass'n.* v. *Kentucky*, 239 U. S. 103, 110, 116; *Brown* v. *Protective Life Insurance Co.*, 188 Ala. 166, 172; *People ex rel. Continental Ins. Co.* v. *Miller*, 177 N. Y. 515, 517; cf. *Maine* v. *Grand Trunk R'y. Co.*, 142 U. S. 217, 227–228; *Spreckels Sugar Refining Co.* v. *McClain*, 192 U. S. 397, 412, 413; *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 151; *Choctaw & Gulf R. R.* v. *Harrison*, 235 U. S. 292, 299.[1] And the court below so held, characterizing the premiums tax as "a Canadian excise" (R. 220).[2] The amount of that tax, therefore, may not be taken as a credit but only as a deduction.

The only remaining question is whether petitioner is entitled to a credit of an amount larger than the income tax which it actually owed and paid to Canada simply because, had it not been subject to the excise tax, it would have had to pay a larger income tax to Canada. The question answers itself. As the court below observed (R. 221), the taxpayer must "prove that he has paid an

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[1] Such a tax would also be regarded by British and Canadian Courts as an excise tax. See *The King* v. *Caledonian Collieries Ltd.* [1928], 3 D. L. R. 657 (Jud. Comm. Privy Council) (Exhibit H, R. 212–216).

[2] Whether the Canadian tax was an income tax or was an excise tax within the meaning of our statute depends, of course, upon our law. Cf. *Biddle* v. *Commissioner*, 302 U. S. 573, 578–579, 581; *F. W. Woolworth Co.* v. *United States*, 91 F. (2d) 973, 976–977 (C. C. A. 3d), certiorari denied, 302 U. S. 768.

actual income-tax, not that an income-tax would have been payable, if facts had been 'otherwise'."

Without any basis in the record, taxpayer asserts (Pet. 5) that for twenty years domestic insurance companies, including itself, "were allowed a credit for Canadian income taxes in an amount equal to the income tax liability under the Canadian Income War Tax Act, without reduction on account of the amount of tax paid under the Special War Revenue Act," and that the decision below reverses that practice. Petitioner cites no Treasury regulation or decision in support of its assertion, and so far as we have been able to ascertain, none exists. Whatever the actual practice of the Bureau may have been in the past, about which there may be much doubt,[3] it cannot alter the plain and unambiguous provisions of the statute. Cf. *Biddle* v. *Commissioner, supra,* p. 582; *Taft* v. *Commissioner,* 304 U. S. 351, 359; *Helvering* v. *N. Y. Trust Co.,* 292 U. S. 455, 467–468; *Koshland* v. *Helvering,* 298 U. S. 441, 447; *Helvering* v. *City Bank Co.,* 296 U. S. 85, 89.

CONCLUSION

The case was correctly decided by the court below. There is no conflict of decisions, and no important

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[3] See I. T. 3138, 1937–2 Cum. Bull. 230; I. T. 3211, 1938–2 Cum. Bull. 177; G. C. M. 11039, XI–2 Cum. Bull. 118 (1932); I. T. 2909, XIV–2 Cum. Bull. 136 (1935). Cf. G. C. M. 8478, IX–2 Cum. Bull. 224 (1930); I. T. 2620, XI–1 Cum. Bull. 44 (1932); I. T. 3193, 1938–1 Cum. Bull. 193.

question of federal law is involved. The petition should therefore be denied.

Respectfully submitted.

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MARCH 1941.